Objection to the Issuance of Permit Approval No. 13814, Reynolds Group, Clark County 2001 OEA 1 (00-W-J-2536)

TOPICS:

Motion to Dismiss
Motion for Summary Judgment
discovery
attorney-client privilege
permit approval
floodway issues
future operational failures
fencing
landscaping
aesthetics

PRESIDING JUDGE:

Lasley

PARTY REPRESENTATIVES:

Petitioner: Philip R. Scharf, Jr. Spokesperson

Robert Oster, Spokesperson

Respondent: Michael J. Huston, Esq.: Baker & Daniels

Nicholas Kile, Esq.: Barnes & Thornburg

IDEM: Janice Lengel, Esq.

ORDER ISSUED:

January 3, 2001

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)			RE THE INDIANA OFFICE OF	
)	SS:	ENVI	RONMENTAL ADJUDICATION	ſ
COUNTY OF MARION)				
IN THE MATTER OF:		`		
IN THE MATTER OF:)		
)		
OBJECTION TO THE ISSUANCE OF)		
PERMIT APPROVAL NO. 13814)	CAUSE NO. 00-W-J-2536	
REYNOLDS GROUP CLARE	COUNTY)		

FINAL ORDER GRANTING MOTION TO DISMISS

This constitutes notice that on September 29, 2000, the Respondent, Reynolds Group, filed a Motion to Dismiss and/or Motion for Summary Judgment in the above-captioned matter. Petitioners filed discovery with the Indiana Department of Environmental Management (IDEM) and IDEM responded to discovery on November 17, 2000. Petitioners filed a response to the Motion to Dismiss on December 14, 2000, wherein they indicated that IDEM had not properly responded to discovery, and, therefore, the Respondent's motion should be denied. Respondent filed a reply on December 28, 2000. Respondent's Motion to Dismiss is hereby **GRANTED** for the following reasons:

- 1. It is not enough for Petitioners to respond to the Motion to Dismiss by alleging that IDEM did not properly respond to discovery. Petitioners cite the fact that IDEM claimed attorney-client privilege in response to some of Petitioners questions. In fact, IDEM claimed attorney-client privilege with respect to question eleven only. Even so, IDEM did answer the question by referring Petitioners to the public file concerning this permit to determine for themselves whether IDEM properly issued the permit. IDEM does not carry the burden in this case of proving that it improperly issued the permit in question. Rather, it is the burden of the Petitioner in an administrative review proceeding to establish that IDEM did not follow the law when it issued a particular permit. To hold otherwise would place an unreasonable burden upon IDEM.
- 2. Petitioners also consistently raise floodway issues as a means of attacking this construction permit. Unfortunately for Petitioners, this office has no authority to grant relief regarding floodway issues.

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3. In addition, Petitioners speculate about potential future operational failures at this treatment facility. First, as Respondent correctly points out, the permit at issue in this

case concerns construction only and not operation. Second, any operational failure that results in a violation of the law is an issue for IDEM's Office of Enforcement. This office

will not usurp IDEM's permitting and enforcement authority by prejudging the applicant's ability to properly run a wastewater treatment plant. Because Petitioners have

potential issues regarding the operation of the wastewater treatment plant, they should

raise those issues if and when Respondent applies for and receives a NPDES permit.

4. The other issues raised by Petitioners in their Petitions for Administrative Review are outside the jurisdiction of IDEM and this office. In other words, Petitioner has not pointed to a single statute or regulation requiring fences or landscaping for aesthetic

purposes. In addition, even though IDEM has issued a construction permit, the

Respondent must still comply with all local laws, for which neither IDEM nor this office

has enforcement authority.

Respondent's Motion to Dismiss is hereby **GRANTED**. Petitioners are hereby **DISMISSED**

from these proceedings for failure to invoke the jurisdiction of this office by failing to state a

claim upon which this office could grant relief.

You are further notified that pursuant to IC 4-21.5-7-5, the Office of Environmental

Adjudication serves as the Ultimate Authority in administrative review of decisions of the

Commissioner of IDEM. This is a Final Order subject to Judicial Review consistent with

applicable provisions of IC 4-21.5-5 et seq. Pursuant to IC 4-21.5-5-5, a Petition for Judicial

Review is timely only if it is filed with a civil court of competent jurisdiction within thirty (30)

days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 3rd day of January 2001.

Linda C. Lasley

Environmental Law Judge